

(2)  
No. 87-74



**In the Supreme Court of the United States**

OCTOBER TERM, 1987

**BRYAN MEMORIAL HOSPITAL, PETITIONER**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION**

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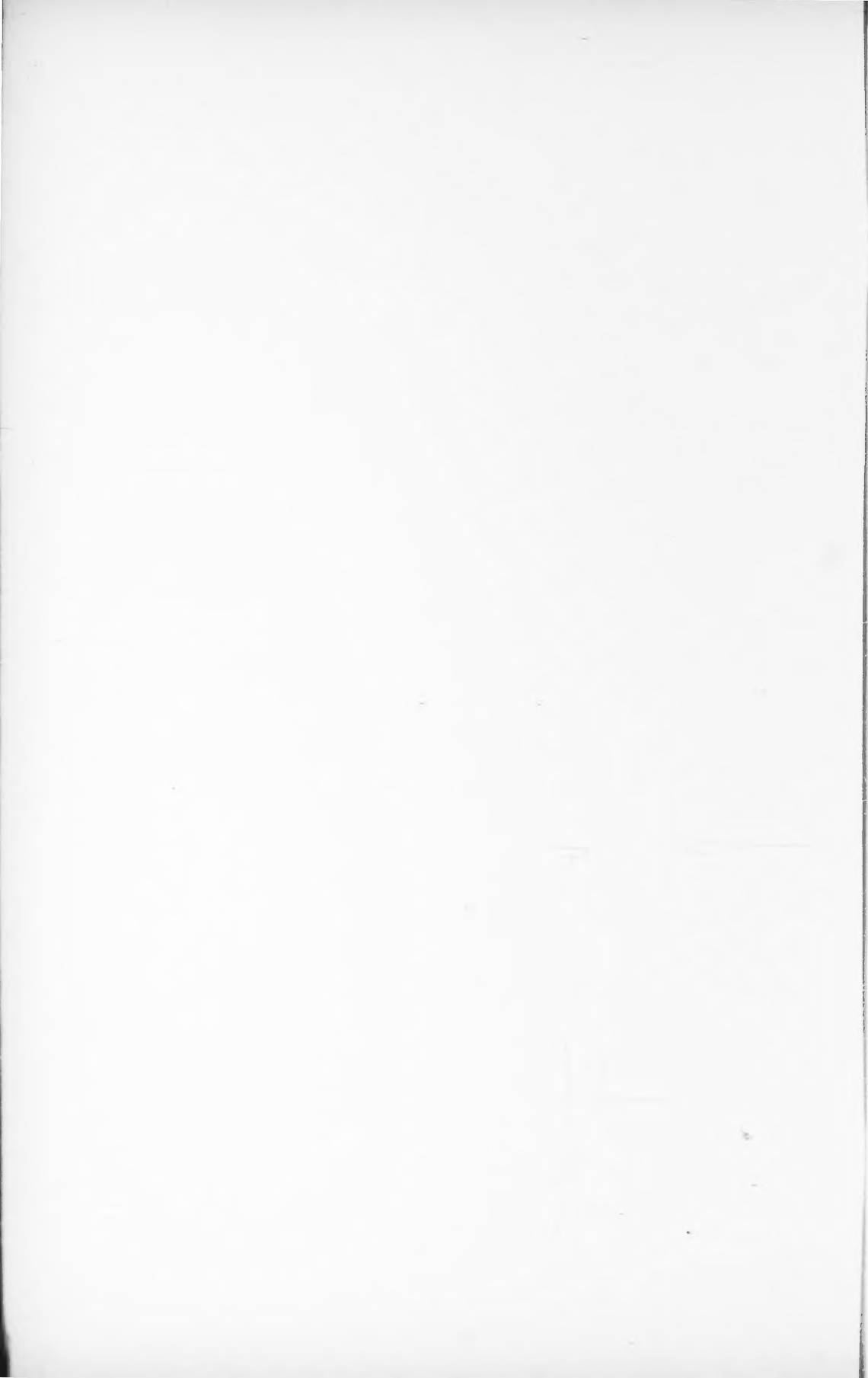
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### **QUESTION PRESENTED**

Whether substantial evidence supported the National Labor Relations Board's finding that petitioner failed to establish an objectively reasonable, good faith doubt as to the Union's continuing majority status.



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### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 27-33) is reported at 814 F.2d 1259 (8th Cir. 1987). The decision and order of the National Labor Relations Board, including the decision of the administrative law judge, is reported at 279 N.L.R.B. No. 39, and is printed at Pet. App. 34-51.

### **JURISDICTION**

The judgment of the court of appeals was entered on March 19, 1987. A petition for rehearing was denied on April 14, 1987. The petition for a writ of certiorari was filed on July 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **STATEMENT**

1. Petitioner operates a health care facility in Lincoln, Nebraska. On March 8, 1982, the Nebraska Nurses Association (the Union) was certified as the collective bargaining

representative for a bargaining unit of approximately 400 of petitioner's employees. Thereafter, the parties engaged in collective bargaining negotiations without reaching complete agreement on a contract. Pet. App. 27-28, 37-38.

Beginning in mid-1982, and continuing through February 1983, petitioner instituted a series of unilateral changes in its existing maternity leave policies and practices. These changes generally decreased the time available for maternity leave; required employees to produce a physician's note; conditioned leave upon supervisory approval and staffing needs; subjected employees on maternity leave to the possibility of being displaced from their jobs; and limited employees' ability to use accrued sick leave while on maternity leave. In February 1983, the Union filed an unfair labor practice charge, challenging the unilateral changes in maternity leave policy. Petitioner thereafter reinstated its previous leave policy, and on May 9, 1983, the parties agreed to settle the complaint. Pet. App. 28-29, 38-45.

On May 31, 1983, while the settlement was awaiting approval by the Regional Director, a group of petitioner's employees filed a petition with the Board seeking the decertification of the Union (Pet. App. 29, 43-44). The next day, petitioner's attorney wrote to Thom Cope, the attorney for that group of employees, requesting any information "indicating that the Nebraska Nurses Association no longer enjoys the support of a majority of the employees within the bargaining unit" (*id.* at 44). Cope replied on June 2, stating that the decertification petition was supported by substantially more than 30 percent of the unit employees.<sup>1</sup> He also claimed to have contacted almost every employee by telephone and advised petitioner that a majority "do not want the union." *Id.* at 29, 44.

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<sup>1</sup> Board rules require that a valid decertification petition be signed by at least 30 percent of the represented employees. 29 C.F.R. 101.18(a).

On June 6, petitioner again wrote to Cope, advising that it was still "uncertain that the hospital possesses sufficient information to warrant a conclusion that the union does not continue to enjoy the support of a majority," and seeking any additional information that would justify withdrawal of recognition (Pet. App. 29, 44). On June 20, Cope sent petitioner eleven affidavits from members of the bargaining unit. In a cover letter, Cope stated that the affidavits "indicate that a majority of the unit does not want the Nebraska Nurses Association to represent them or wants a new election," but he added that he would "not specifically divulge the names, because they have sought and will receive anonymity" (*id.* at 44).<sup>2</sup> Taken together, the affidavits claimed that about 225 of the approximately 379 unit members either no longer desired representation or wanted a new election (*id.* at 29, 45).

After receiving the June 20 letter and the enclosed affidavits, petitioner immediately withdrew recognition from the Union. Several days later, petitioner made unilateral changes in the health insurance benefits available to members of the bargaining unit. Pet. App. 30, 45.

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<sup>2</sup> Each of the enclosed affidavits contained the following language (Pet. App. 44-45):

\_\_\_\_\_, being first duly sworn on oath deposes and says that she is a member of the bargaining unit at Bryan Memorial Hospital.

That she has personally spoken to or communicated with those individuals listed in Exhibit A, which is herein incorporated by reference as though fully set forth herein.

That \_\_\_\_\_ of the people listed in Exhibit A have told her that they no longer wanted the Nebraska Nurses Association (C.A.R.E.) to represent them, or that they wanted a new election.

That affiant can identify those individuals, but chooses not to do so, because they have expressed a desire for anonymity and confidentiality, and therefore affiant will not disclose their names at this time.

Further affiant sayeth not.



2. The Union thereafter filed new charges, alleging that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by withdrawing recognition from and refusing to bargain with the Union. The Board's Regional Director issued a complaint charging petitioner with unfair labor practices. Pet. App. 36.

Adopting the findings and conclusions of the administrative law judge (ALJ) (Pet. App. 34, 35), the Board found that petitioner's withdrawal of recognition from the Union, and its unilateral changes in maternity leave and insurance policies, violated Section 8(a)(5) of the Act. The Board rejected (Pet. App. 46) petitioner's contention that the June 20 letter and the enclosed affidavits presented petitioner with an objective basis for entertaining a good-faith doubt of the Union's continued majority status. The Board explained (*ibid.*) that the eleven affidavits "may be viewed, only, as sufficient to convey to [petitioner] the views of the 11 affiants, and not the views of unnamed other employees," and it noted the "well settled" principle that "employer receipt of employees' unverified assertions[] that the majority of employees no longer support their union representative, is insufficient to create 'a reasonably based conviction that the claimed desire of those employees to be rid of the union' is factual" (*ibid.* (quoting *Cornell of California, Inc.*, 222 N.L.R.B. 303 (1976))). Moreover, the affidavits "d[id] not assert that a majority [of the unit employees] no longer want[ed] representation," but only that "a majority *either* do not want continued representation *or* desire to have an election" (Pet. App. 46 (emphasis in original)). The Board therefore directed petitioner to bargain with the Union upon request (*id.* at 47, 48).<sup>3</sup>

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<sup>3</sup> The Board also ordered petitioner to make whole the unit employees for any losses that they suffered as a result of the unilateral changes in the terms and conditions of employment (Pet. App. 49).

3. The court of appeals unanimously enforced the Board's order (Pet. App. 27-33). The court explained (*id.* at 30) that a certified union enjoys a presumption of continued majority status that is generally conclusive during the year following certification, but that is thereafter rebuttable by an employer that is able to show, based on objective considerations, that its refusal to bargain with the union was based on a good faith doubt as to the union's continued majority status. Applying those standards, the court held (*id.* at 31) that the eleven affidavits did not support a reasonable good faith doubt. The court explained (*ibid.* (emphasis in original)) that the "affidavits reliably express only the views of the named affiants and otherwise convey only unverified claims about the views of anonymous individuals. Even on their face, the affidavits do not assert that a majority of the employees whose views are said to be represented have withdrawn support from the Union, \* \* \* [but] merely state that the anonymous employees either do not want the Union *or* want a new election." Moreover, deferring to the Board's decision in *Dresser Industries, Inc.*, 264 N.L.R.B. 1088 (1982), the court held (Pet. App. 31-32) that the filing of the decertification petition did not, by itself, provide a sufficient basis for doubt about a union's continued majority status.

#### ARGUMENT

1. Petitioner contends (Pet. 6-13) that there is a conflict among the circuits concerning whether, once an employer shows an objective, good faith basis for doubting a union's majority status, the burden thereafter shifts to the Board's General Counsel to show that the union actually enjoyed majority support. That question is not presented in this case. Petitioner concedes that an employer must at a minimum "produce sufficient evi-

dence to cast serious doubt on the union's continued majority status' " (Pet. 7 (quoting *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1445 (1959) (emphasis omitted))). The Board, upheld by the court of appeals, held that petitioner failed to meet that evidentiary standard. That judgment is supported by substantial evidence and does not warrant further review. See *NLRB v. Wilder Constr. Co., Inc.*, 804 F.2d 1122, 1125 (9th Cir. 1986); *NLRB v. Windham Community Memorial Hosp.*, 577 F.2d 805, 811 (2d Cir. 1978); *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975); *Allied Industrial Workers v. NLRB*, 476 F.2d 868, 883 (D.C. Cir. 1973). The Board was amply justified in concluding that the eleven affidavits—containing unverified references to unidentified other unit employees—did not constitute "sufficient evidence to cast serious doubt on the union's continued majority status" (Pet. 7).

2. Petitioner next asserts (Pet. 13-18) that the circuits are in conflict concerning the quantum of proof that an employer must adduce in order to show a reasonable good faith basis for doubting the majority status of a union. That question is likewise not presented in this case. Petitioner observes (*id.* at 13) that "the less stringent standard" of proof requires an employer to establish that it had a "reasonable basis" for doubting the union's support. But petitioner fails to show that the Board, or the court of appeals, applied a different and more rigorous standard of proof in this case. Indeed, petitioner cites (*id.* at 13 & n.7) the Eighth Circuit as among the "circuits [that] have required [the] \* \* \* 'reasonable basis' [standard]." Accordingly, even if petitioner were correct in claiming a conflict in the standards of proof, this case is an inappropriate vehicle for resolving that conflict. And petitioner fails to show how the evidence it marshaled in this case could be found sufficient under any formulation of the burden of proof.

3. Finally, petitioner contends (Pet. 20-24) that the court of appeals should not have relied on the Board's decision in *Dresser Industries, Inc.*, *supra*, which held that the filing of a decertification petition, without more, does not constitute sufficient grounds to doubt the majority status of a union. In petitioner's view, *Dresser Industries* is inconsistent with Congress's purported determination that " 'the goal of employee free choice outweighs the goal of industrial stability when a union no longer commands majority support' " (Pet. 23 (citation and emphasis omitted)). That claim is plainly meritless. A decertification petition requires the support of only 30% of the unit employees (see Pet. App. 29 n.3; 29 C.F.R. 101.18(a)). Standing alone, therefore, such a petition does not show whether a union "no longer commands majority support." The Board's rule in *Dresser*—that absent other objective evidence sufficient to support a good faith doubt, an employer must continue to bargain with the union pending an election—is entirely consistent with the balance struck by Congress in the Act and is well within the Board's discretion. See *Brooks v. NLRB*, 348 U.S. 96, 104 (1954); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).<sup>4</sup>

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<sup>4</sup> Petitioner concedes (Pet. 26) that the Board may properly require it to establish a reasonable, good faith basis for doubting the union's continued majority status. But it points to nothing in the decisions below to support its claim (*id.* at 24-26) that the Board and the court of appeals required it to carry the further burden of proving an actual loss of majority status, in purported violation of Fed. R. Evid. 301.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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